

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Marcia Williams and Karen Wunz,	)	
	)	
Plaintiffs,	)	
	)	Case No. 1:18-cv-370
v.	)	
	)	
National Labor Relations Board,	)	
	)	Complaint for Declaratory and Injunctive
Defendant.	)	Relief
	)	
	)	

---

Frank D. Garrison (IN Bar No: 34024-49)  
Glenn M. Taubman\*  
\* *Application for Pro Hac Vice to be filed*  
c/o National Right to Work Legal Defense  
Foundation, Inc.  
8001 Braddock Road, Suite 600  
Springfield, Virginia 22160  
Telephone: 703-321-8510  
Facsimile: 703-321-9319  
fdg@nrtw.org  
gmt@nrtw.org

*Attorneys for Plaintiffs*

## I. PRELIMINARY STATEMENT

Plaintiffs Marcia Williams and Karen Wunz bring this action challenging the National Labor Relations Board's ("NLRB" or "Board") "Settlement Bar" rule established in *Poole Foundry & Machine Co.*, 95 NLRB 34, *enforced*, 192 F.2d 740 (4th Cir. 1951) ("*Poole Foundry*"), and its Order applying that rule to dismiss their petition to decertify the International Brotherhood of Teamsters, Local Union 397 ("Teamsters") as their exclusive bargaining representative. The "Settlement Bar" defies the National Labor Relations Act's ("NLRA") text and plain meaning. Therefore, the Board's application of the Settlement Bar to Plaintiffs, and its October 9, 2018 Order relying upon the Settlement Bar to dismiss Plaintiffs' decertification petition are *ultra-vires*, violate the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and are unconstitutional. In support of these contentions, Plaintiffs allege:

## II. JURISDICTION AND VENUE

1. The Court has jurisdiction to adjudicate this case pursuant to 28 U.S.C. § 1331 because it arises under the United States Constitution and involves a federal question; to 5 U.S.C. §§ 702, 704, and 706, because it requests judicial review of unlawful agency action; to 28 U.S.C. §§ 2201 and 2202, because Plaintiffs seek declaratory relief; and to 28 U.S.C. § 1337, because it arises under an Act of Congress regulating commerce.

2. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391 because Defendant is an agency of the United States, Plaintiffs reside in the Western District of Pennsylvania, and a substantial part of the events or omissions giving rise to the claim occurred in the Western District of Pennsylvania.

### III. PARTIES

3. Plaintiffs Williams and Wunz are school bus drivers who work for Krise Transportation, Inc. (“Krise”). They are employed within a bargaining unit represented by the International Brotherhood of Teamsters, Local Union 397, and its affiliates.

4. Plaintiff Williams resides in North Springfield, Pennsylvania.

5. Plaintiff Wunz resides in Albion, Pennsylvania.

6. Defendant National Labor Relations Board is an independent federal agency of the United States as defined under 18 U.S.C. § 6, 29 U.S.C. § 153, and 5 U.S.C. § 551.

### IV. LEGAL BACKGROUND

#### **The National Labor Relations Act**

7. The NLRA provides employees with a statutory right to join or assist a labor organization and to have that organization represent them in collective bargaining. 29 U.S.C. § 157 (“Section 7”).

8. Section 7 also provides employees with a statutory right to refrain from joining or assisting a labor organization and to refrain from collective bargaining. *Id.*

9. Whether a bargaining unit of employees is or is not represented by a union for purposes of collective bargaining is determined by a majority of the employees within that bargaining unit. 29 U.S.C. § 159 (“Section 9”).

10. Congress created the NLRB to determine, among other things, whether a majority of employees in an appropriate bargaining unit choose to be represented by a labor organization. 29 U.S.C. § 153.

11. In fulfilling its role to determine whether a majority of employees in a bargaining unit choose to be represented by a labor organization or refrain from representation, Congress places an affirmative duty on the NLRB that requires:

*Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—(A) by an employee or group of employees . . . [who] assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative defined in subsection (a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.*

29 U.S.C. § 159(c) (emphasis added).

12. If the NLRB finds, on the Subsection 9(c)'s hearing record, that "a question of representation exists, [the Board] *shall* direct an election by secret ballot and shall certify the results thereof." *Id.* (emphasis added).

#### The NLRB's "Settlement Bar"

13. In *Poole Foundry*, a case involving an employer's refusal to bargain with a union, the NLRB enacted the "Settlement Bar" rule which categorically precludes the NLRB from investigating whether a question concerning representation exists as to a union's majority status until a reasonable period of time for bargaining has elapsed after the settlement agreement's date ("Settlement Bar"). 95 NLRB at 36. The Settlement Bar has been applied to further establish the NLRB will not allow a question concerning representation to be raised where an unfair labor practice charge's settlement agreement comes before a decertification petition was filed. *Truserv Corp.*, 349 NLRB 227 (2007).

#### V. FACTUAL BACKGROUND

14. On March 8, 2018, Krise and the Teamsters entered into an Informal Board Settlement Agreement ("Settlement Agreement") in an NLRB unfair labor practice case. (Ex. A).

15. The Settlement Agreement did not include an admission, finding, or adjudication that Krise violated the NLRA. *Id.*

16. The Settlement Agreement included a clause reading:

**EXTENSION OF BARGAINING OBLIGATION** – The Charged Party agrees to bargain in good faith with the [Teamsters], on request, as the recognized bargaining representative in the appropriate unit. The [Teamster's] status as the exclusive bargaining representative may not be challenged for a period of 12-months from the date that the parties have their first bargaining session.

*Id.*

17. Plaintiffs Williams and Wunz were not parties to the Settlement Agreement.

18. On May 8, 2018, Plaintiff Williams filed a decertification petition with the NLRB in accordance with Subsection 9(c). (Ex. B).

19. Twenty-four (24) of a possible twenty-eight (28) Krise employees, including Plaintiffs Williams and Wunz, signed the showing of interest attached to the decertification petition to exercise their Sections 7 and 9 rights to oppose union representation.

20. On May 10, 2018, Nancy Wilson, the NLRB Regional Director for Region 6 located in Pittsburgh, Pennsylvania, issued a Notice of Representation Hearing informing Krise, the Teamsters, and Plaintiff Williams that a hearing would be held on May 18, 2018, and called for a Statement of Position from each party. (Ex. C).

21. On May 17, 2018, citing Teamster's assertion in its Statement of Position that the petition should be barred because of the Settlement Agreement's Extension of Bargaining Obligation, Regional Director Wilson issued an Order Withdrawing Notice of Representation Hearing. (Ex. D).

22. On May 25, 2018, Regional Director Wilson issued an Order to Show Cause why the "Petition warrants further processing." (Ex. E).

23. More specifically, the parties were directed to address two issues: “(1) The date that [Krise] and [the Teamsters] commenced contract negotiations; the subsequent dates, if any, that the parties met for contract negotiations; what transpired at each of those contract negotiation sessions; and, the status of the parties’ contract negotiations as of the date that the petition was filed;” and:

(2) [w]hether the petition should be dismissed based on the ‘Extension of Bargaining Obligation’ provision of the Settlement Agreement *which precludes one from raising a question concerning representation* for a period of 12 months from the date that the parties commenced contract negotiations, i.e. April 6, 2018. *See Generally Mar-Jac Poultry Co.*, 136 NLRB 785 (1962)[.]

*Id.* (emphasis added).

24. On June 26, 2018, Regional Director Wilson issued an Order Dismissing Plaintiffs’ petition, in reliance upon, among other things, the “Settlement Bar.” (Ex. F).

25. On July 10, 2018, Plaintiff Williams filed with the NLRB a Request for Review of the Regional Director’s dismissal of the employees’ decertification petition. (Ex. G).

26. On October 9, 2018, the NLRB, citing *Poole Foundry*, issued an Order (“Dismissal Order”) upholding the Regional Director’s Order dismissing the employees’ decertification petition. (Ex. H). To date no hearing or decertification election has been held regarding Plaintiffs’ petition.

27. The Dismissal Order contained a footnote wherein two NLRB Members explained that, “in their view,” the “[S]ettlement [A]greement only *bars the employees from exercising their Section 7 right of free choice for a reasonable period of time.*” (emphasis added). *Id.*

## VI. CAUSES OF ACTION

### Count I: Violation of the National Labor Relations Act (*Ultra -Vires* Administrative Rule)

28. Paragraphs 1 through 27 are incorporated herein by reference.

29. When an agency adopts a rule that ignores Congress’ clear commands and contravenes a statute’s plain meaning, it acts outside of its delegated authority, and thus its acts are *ultra-vires*.

30. Subsection 9(c)'s plain meaning requires the NLRB *shall* investigate whether a question concerning representation exists *whenever* an employee or group of employees file a petition alleging that a union no longer commands a majority.

31. Given Subsection 9(c)'s commands and plain meaning, the NLRB does not possess any authority to ignore its affirmative duty by adopting the "Settlement Bar," which precludes Plaintiffs from raising a question concerning representation and, in the process, denies employees their Sections 7 and 9 rights to refrain from collective activity.

32. The "Settlement Bar," as applied to Plaintiffs, causes them injury by denying them their Sections 7 and 9 rights, to include forcing them to be exclusively represented by a minority union that they oppose.

33. In refusing to investigate Plaintiffs' decertification petition and denying them the ability to raise a question concerning representation, the NLRB has acted outside of its delegated statutory authority and its actions are *ultra-vires*.

Count II: Violation of the Administrative Procedure Act  
(5 U.S.C. § 706(C))

34. Paragraphs 1 through 33 are incorporated herein by reference.

35. The Administrative Procedure Act ("APA") defines, in relevant part, a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency[.]" 5 U.S.C. § 551(4).

36. The APA defines "agency action" as "the whole or a part of an agency rule[.]" 5 U.S.C. 551(13).

37. Final agency actions that are in excess of statutory authority violate the APA. 5 U.S.C. §§ 704, 706(C).

38. Nothing in the NLRA's text or plain meaning grants the NLRB statutory authority to issue a rule that categorically bars a group of employees from raising a question concerning representation, let alone a rule based merely on the employer's settlement of unfair labor practice charges to which the employees were not parties.

39. The NLRA does not grant the NLRB statutory authority to issue a rule that denies employees the ability to exercise their Sections 7 and 9 rights for a "reasonable time" or otherwise.

40. The NLRB's application of the "Settlement Bar" injures Plaintiffs by depriving them of the right to raise a question concerning representation, and thus denies them their Sections 7 and 9 rights. Plaintiffs are also injured because the NLRB is forcing them to be exclusively represented by a minority union that they oppose.

41. The NLRB's application of the *ultra-vires* "Settlement Bar" to dismiss Plaintiffs' decertification petition, therefore, violates the APA. 5 U.S.C. § 706(C).

**Count III: Violation of the National Labor Relations Act**  
(*Ultra -Vires* Administrative Order)

42. Paragraphs 1 through 41 are incorporated herein by reference.

43. The NLRB's Dismissal Order applying the "Settlement Bar" to dismiss Plaintiffs' decertification petition—categorically precluding them and the other signatories from raising a question concerning representation—contravenes Subsection 9(c)'s plain meaning, which places an affirmative duty on the NLRB to investigate a decertification petition and is thus *ultra-vires*.

44. The NLRB's application of the "Settlement Bar" in its Dismissal Order injures Plaintiffs by depriving them of their Sections 7 and 9 rights, to include forcing them to be exclusively represented by a minority union that they oppose.

45. The NLRB has thus acted outside of its statutory authority and its Dismissal Order is *ultra-vires*.



Count IV: Violation of the Administrative Procedure Act  
(5 U.S.C. § 706(C))

46. Paragraphs 1 through 45 are incorporated herein by reference.

47. The APA defines an “order” as “the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing[.]” 5 U.S.C. § 551(6).

48. The APA defines “agency action” as “the whole or a part of an agency . . . order[.]” 5 U.S.C. 551(13).

49. Final agency orders that are in excess of statutory authority violate the APA. 5 U.S.C. §§ 704, 706(C).

50. The NLRA’s text and plain meaning do not grant the NLRB statutory authority to issue an order that categorically bars a group of employees from raising a question concerning representation.

51. The NLRA’s text and plain meaning do not grant the NLRB statutory authority to issue an order that denies employees the ability to exercise their Section 7 rights for a “reasonable time” or otherwise.

52. The NLRB’s application of the “Settlement Bar” in its Dismissal Order injures Plaintiffs by depriving them of their Sections 7 and 9 rights, to include forcing them to be exclusively represented by a minority union that they oppose.

53. The NLRB’s application of the *ultra-vires* “Settlement Bar” in its Dismissal Order dismissing Plaintiffs’ decertification petition therefore violates the APA. 5 U.S.C. § 706(C).

Count V: Violation of the Separation of Powers  
(Violation of U.S. Const. Art. I and the Non-Delegation Doctrine)

54. Paragraphs 1 through 53 are incorporated herein by reference.

55. The U.S. Constitution, Article I, Section I, provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States[.]”

56. The Constitution thus bars federal agencies from making or amending law outside of the powers Congress delegates to it.

57. The Constitution also bars Congress from delegating to a federal agency legislative power to make or amend a law.

58. Subsection 9(c)’s text and plain meaning do not allow the NLRB to create the categorical “Settlement Bar,” which ignores the Board’s statutory duty to investigate employees’ election petitions and precludes employees from exercising their right to raise a question concerning representation, thereby denying employees the ability to exercise their rights under Sections 7 and 9.

59. The NLRB’s creation and application of the “Settlement Bar” injures Plaintiffs by depriving them of the right to raise a question concerning representation and, therefore, injures them by depriving them of their ability to exercise their rights under Sections 7 and 9, to include forcing them to be exclusively represented by a minority union that they oppose.

60. The NLRB’s “Settlement Bar” rule and its Dismissal Order thus violate the separation of powers and the nondelegation doctrine.

**Count VI: Violation of Due Process**  
(Violation of U.S. Const. Amend. V)

61. Paragraphs 1 through 60 are incorporated herein by reference.

62. The U.S. Constitution requires federal agencies to provide due process before denying a statutory right.

63. Under Section 7, employees have a statutory right to refrain from joining or assisting a labor organization and to refrain from collective bargaining.

64. In order to exercise their Section 7 rights, employees have a statutory right under Subsec-

tion 9(c) to raise a question concerning representation.

65. The NLRB's "Settlement Bar" rule and its Dismissal Order applying that bar without an investigation deprives Plaintiffs of due process concerning their rights explicitly provided for in Subsection 9(c).

## VII. Prayer for Relief

WHEREFORE, Plaintiffs pray this Court:

### A. Declaratory Judgment:

1. Enter a declaratory judgment that the "Settlement Bar," as applied to Plaintiffs: (1) is outside of the Board's delegated statutory authority under the NLRA and thus is *ultra-vires* agency action; (2) is outside of its delegated statutory authority and thus violates 5 U.S.C. § 706(C); (3) violates the Constitution's separation-of-powers and nondelegation doctrines; and (4) deprives Plaintiffs of their right to due process of law.

2. Enter a declaratory judgment that the NLRB's Dismissal Order applying the "Settlement Bar" rule to dismiss Plaintiffs' decertification petition: (1) is outside of the Board's delegated statutory authority under the NLRA and thus is *ultra-vires* agency action; (2) is outside of the Board's delegated statutory authority and thus violates 5 U.S.C. § 706(C); (3) violates the Constitution's separation-of-powers and nondelegation doctrines; and (4) deprives Plaintiffs of their right to due process of law.

### B. Injunction:

1. Enter an injunction preventing the NLRB from applying the *Poole Foundry* "Settlement Bar" rule to Plaintiffs' decertification petition;

2. Enter a mandatory injunction requiring the NLRB to exercise its statutory duty under Subsection 9(c) to determine whether a question concerning representation exists regarding Plaintiffs' decertification petition;

C. Costs and Attorneys' Fees:

Award Plaintiffs their costs, expenses, and reasonable attorneys' fees pursuant to 28 U.S.C. § 2412(d)(1)(A).

D. Retain jurisdiction:

Retain jurisdiction over this action for a reasonable period of time after entering a final judgment, to ensure the NLRB complies with this Court's Orders.

E. Other legal and/or equitable relief:

Grant other legal and/or equitable relief the Court deems just and proper.

Respectfully submitted, November 27, 2018.

/s/ Frank D. Garrison

Frank D. Garrison (IN Bar No: 34024-49)

Glenn M. Taubman\*

*\* Application for Pro Hac Vice to be filed*

c/o National Right to Work Legal Defense  
Foundation, Inc.

8001 Braddock Road, Suite 600

Springfield, Virginia 22160

Telephone: 703-321-8510

Facsimile: 703-321-9319

fdg@nrtw.org

gmt@nrtw.org

*Attorneys for Plaintiffs*